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No. 02-1640

In the Supreme Court of the United States

BEVERLY HACEESA, INDIVIDUALLY, AND FIRST FINANCIAL TRUST COMPANY, AS CONSERVATOR FOR SHENOEL HACEESA, A MINOR, PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether, under the Federal Tort Claims Act (FTCA), the United States, in administering a hospital in New Mexico, should receive the same protection under the state medical malpractice liability cap as qualifying private hospitals.

2. Whether the court of appeals' reading of New Mexico law on the apportionment of damages between successive tortfeasors was fundamentally unfair and deprived petitioners of their property without due process of law.

3. Whether the district court had jurisdiction to consider claims of the decedent's estate that the estate did not bring before the court within the time limits set by the FTCA.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1.1 to 1.26) is reported at 309 F.3d 722. The opinions of the district court (Pet. App. 1.27 to 1.33, 1.34 to 1.39, 1.40 to 1.52) are unreported.

JURISDICTION

The judgment of the court of appeals was entered on October 24, 2002. A petition for rehearing was denied on November 26, 2002 (Pet. App. 1.53). The petition for a writ of certiorari was filed on February 21, 2003. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. Hardy Haceesa, aged 23, died on April 28, 1998, from Hantavirus Pulmonary Syndrome (HPS), a rare disease caused by inhaling airborne particles from the urine of infected mice. Three days earlier, on April 25, 1998, he had been seen by a doctor and nurse at the Northern New Mexico Navajo Hospital in Shiprock, New Mexico (Shiprock Hospital), owned and operated by the Indian Health Service (IHS), an agency of the U.S. Department of Health and Human Services (HHS). Those personnel failed to identify his condition as HPS. He was subsequently seen at a private hospital, San Juan Regional Medical Center (San Juan Hospital) on April 27 and on the morning of April 28. Mr. Haceesa died shortly after arrival at a third hospital, University of New Mexico Hospital. Pet. App. 1.40 to 1.41.

2. On July 2, 1998, petitioners Beverly Haceesa (Mr. Haceesa's wife) and Shenoel Haceesa (his daughter), filed administrative claims with the IHS seeking compensation for damages caused by the IHS's failure to detect the disease on April 25, 1998. The July 2 claim for Beverly Haceesa sought compensation for "loss of spousal support, loss of consortium, loss of love and affection, emotional distress and mental anguish." Pet. App. 1.66. On October 26, 1998, Beverly Haceesa filed an additional claim as personal representative for Hardy Haceesa's estate. The estate's claim sought compensation for "loss of enjoyment of life, pain and suffering, emotional distress and mental anguish." *Id.* at 1.73.

On January 15, 1999, petitioners brought the present action against the United States under the Federal Tort Claims Act (FTCA), 28 U.S.C. 1346(b), 2671-2680,

in the United States District Court for the District of New Mexico. Pet. App. 1.28, 1.76 to 1.77. At that time, the IHS had not finally denied the administrative claims, which it ultimately did on April 28, 1999. *Id.* at 1.28. On October 6, 1999, 161 days after the final denial of the administrative claim, counsel for the United States advised counsel for petitioners that the government would not object to an amendment of the complaint to include the claims of the estate. *Id.* at 1.22. On December 3, 1999, 219 days after the final denial, petitioners sought to file an amended complaint. *Id.* at 1.28.

The United States opposed the motion to amend the complaint on the ground that more than six months had elapsed between the IHS's final denial of the estate's claims and the estate's action on those claims in the district court. See 28 U.S.C. 2401(b) (providing that such claims shall be "forever barred"). On March 6, 2000, the district court granted in relevant part the motion to amend. Pet. App. 1.27 to 1.33. On April 20, 2000, *id.* at 1.18, petitioners filed their amended complaint,

which included the claims of the estate for "[p]ain and suffering and emotional distress caused to Hardy Haceesa prior to his death" and "[l]oss of enjoyment of life to Hardy Haceesa." *Id.* at 1.87.

3. The case was tried from April 2 to April 4, 2001. On June 20, 2001, District Judge Martha Vazquez found the United States liable for all of the damages resulting from Mr. Haceesa's loss of chance of survival, which the court determined to be 65%. Pet. App. 1.47. The court based its finding of liability on the failure of the nurse who treated Mr. Haceesa to meet the standard of care, and on the failure of the administrators of the hospital to train the nurse adequately. *Id.* at 1.49 to 1.51. The

court calculated total damages of $3,307,720.73, which, decreased by 35%, resulted in an award against the United States of $2,150,018.47. *Id.* at 1.51. A total of $500,000 of the damages ($325,000 after the 35% reduction) represented the claims of Mr. Haceesa's wife and daughter, *id.* at 1.48; the remainder represented the claims of the estate.

The United States did not appeal the finding of liability, but did appeal three issues concerning the damage award. It argued, first, that the plaintiffs were limited to a recovery of $600,000 by the New Mexico Medical Malpractice Act's cap on non-economic damages, N.M. Stat. Ann. § 41-5-6(A) (Michie 2002); second, that damages against the government should have been reduced because of the negligence of San Juan Hospital; and, third, that the claims of the estate were barred by 28 U.S.C. 2401(b) because they were not filed within six months of the agency's final denial of the estate's administrative claim.

The court of appeals ruled in favor of the United States on each of the three issues. First, it determined that the United States was covered by the New Mexico damages cap, holding that because an analogous suit against a private hospital would have been subject to the cap on recovery, the plaintiffs' suit against the government under the FTCA was also subject to the $600,000 cap. Pet. App. 1.3 to 1.12. Second, the court held that, although the harm caused by each of the two hospitals was "successive" as defined by New Mexico law, the case should be remanded to district court for findings on the loss of chance of survival caused by the government's medical negligence, excluding those resulting from the private hospital's negligence. *Id.* at 1.12 to 1.17. Third, the court of appeals ruled that because the estate had filed its suit over six months

after denial of its administrative claim, outside the time allowed by 28 U.S.C. 2401(b) of the FTCA, the estate's claims were barred. Pet. App. 1.17 to 1.22.

ARGUMENT

Petitioners ask this Court to grant plenary review and overturn all three of the court of appeals' rulings. They do not claim that the decision of the court of appeals conflicts with any prior decision of this Court. They do argue that the decision conflicts with the decisions of other circuits, but with one exception their arguments lack merit. Although petitioners do identify one issue of general importance raised by this case—the application of state law caps on recovery for medical malpractice to suits against the United States under the Federal Tort Claims Act—this case presents an unsatisfactory vehicle for resolving any question related to that issue. Further, the court of appeals was correct in each of its holdings. Accordingly, none of the questions petitioners present warrants review by this Court.

1. Petitioners first argue that the United States should not receive the protection of New Mexico's cap on damages for medical malpractice awards. Their argument is divided into two parts: first, that the court of appeals erred in concluding that the United States was in like circumstances with a private New Mexico hospital that would benefit from New Mexico's statutory cap on damages for medical malpractice; second, that the court of appeals erred in permitting the United States to "assert an affirmative defense which would not be available to the individual employee," Pet. 17.

a. The United States is in like circumstances with a private hospital that would receive the protection of New Mexico's statutory cap on damages for medical

malpractice. The relevant provision of the FTCA states that

> [t]he United States shall be liable, respecting the provisions of this title relating to tort claims, in the same manner and to the same extent as a private individual under like circumstances, but shall not be liable for interest prior to judgment or for punitive damages.

28 U.S.C. 2674. The relevant provision of New Mexico's Medical Malpractice Act states that

> [e]xcept for punitive damages and medical care and related benefits, the aggregate dollar amount recoverable by all persons for or arising from any injury or death to a patient as a result of malpractice shall not exceed six hundred thousand dollars ($600,000) per occurrence.

N.M. Stat. Ann. § 41-5-6(A) (Michie 2002). The Act further requires that to qualify for its protections, a health care provider must (1) "establish its financial responsibility" by carrying malpractice insurance for at least $200,000 per incident (or keeping funds on deposit with the state); and (2) pay into the state's fund to cover awards of future medical expenses, which are not subject to the statutory cap on damages. *Id.* § 41-5-5(A) (giving requirements for qualification); see *id.* § 41-5-7 (governing payments of future medical expenses from the fund).

The United States, of course, neither carries malpractice insurance nor pays into state compensation funds. The courts of appeals that have applied 28 U.S.C. 2674 to statutes such as New Mexico's have concluded that neither difference is material. *Carter* v. *United States*, 982 F.2d 1141, 1143-1144 (7th Cir. 1992)

(Indiana); *Lozada* v. *United States*, 974 F.2d 986, 987-988 (8th Cir. 1992) (Nebraska); *Owen* v. *United States*, 935 F.2d 734, 737-738 (5th Cir. 1991) (Louisiana). Those courts have reasoned that the purposes of the statutory qualification requirements are to ensure that health care providers are able to pay judgments against them, and that they have contributed to the support of the state fund that pays the remainder of the judgments. The United States is able to pay any judgment against it; and, because the United States would not claim entitlement to indemnification from the state-sponsored fund, it is irrelevant that the United States does not pay into that fund. See *Carter*, 982 F.2d at 1143-1144; *Lozada*, 974 F.2d at 988; *Owen*, 935 F.2d at 737-738.

Petitioners claim that *Lozada* favors their position, because of language in that case stating that "the federal government is willing to meet the objectives of the Nebraska Act" analyzed by that case. Pet. 11 (quoting 974 F.2d at 989). They argue that among the objectives of New Mexico's Act are the state administrative process that plaintiffs must exhaust before bringing a medical malpractice action in state court; the procedure by which a plaintiff who prevails in that administrative process obtains assistance in locating an expert witness; and the continuing jurisdiction of the state courts over payments of future medical expenses. Pet. 10-12.[1]

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[1] Petitioners also claim (Pet. 11, 13-14) that the decision of the court of appeals in this case conflicts with the Tenth Circuit's own earlier decision of *Hill* v. *United States*, 81 F.3d 118 (1996). Read fairly, *Hill* supports the reasoning and result of the court of appeals in this case. See Pet. App. 1.6 (stating that *Hill* "endorsed" *Carter*, *Lozada*, and *Owen*, and noting *Hill*'s dictum, 81 F.3d at 121, that "where there is a specific cap on tort liability, the United States Government may benefit from this limit although it did not

Petitioners' apparent claim that these characteristics of New Mexico's statute would require the Eighth Circuit, following *Lozada*, to decide this case differently lacks merit. The state statutes at issue in *Carter*, *Lozada*, and *Owen* each contain provisions similar to those petitioners highlight in the New Mexico Act.[2] Yet none of these courts viewed the provisions as meriting discussion. The courts of appeals have not required an exact similarity of circumstances between the United States and any given private defendant, but have applied state law provisions, including damage caps, without regard to those aspects that have little or no application to the federal government in light of its unique characteristics. The courts of appeal are correct in their uniform view that 28 U.S.C. 2674 requires a search for "'*like* circumstances'—not '*identical*

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otherwise participate in the statutory scheme which provides the cap"). Further, even if *Hill* were inconsistent with the result in this case, that inconsistency would still not justify review by this Court. See *Wisniewski* v. *United States*, 353 U.S. 901, 902 (1957) (per curiam) ("It is primarily the task of a Court of Appeals to reconcile its internal difficulties.").

[2] See La. Rev. Stat. Ann. § 40:1299.47.A(1) (West 2001 & Supp. 2003) (review by state administrative panel); *id.* § 40:1299.47.H (panel members as expert witnesses); *id.* § 40:1299.43.C (ongoing payment of future medical expenses); Neb. Rev. Stat. Ann. § 44-2840 (Michie 2000 & Supp. 2002) (review by panel); *id.* § 44-2844 (panel members as expert witnesses); Ind. Code Ann. § 16-9.5-9-1 (West 1992) (repealed 1993) (review by panel); *id.* § 16-9.5-9-9 (panel members as expert witnesses). Nebraska's and Indiana's statutes did not include a provision for ongoing payment of future medical expenses, and there are other minor differences among the statutes—all three appear to contemplate, for example, that panel members themselves shall serve as expert witnesses rather than directing the panel to assist plaintiffs in locating expert witnesses.

circumstances.'" *Carter*, 982 F.2d at 1144. No clarification of the law is required.

b. Petitioners further argue (Pet. 14-17) that the court of appeals erred by not requiring the United States to "prove that New Mexico hospitals are protected by the NMMMA when sued in *respondeat superior* for the negligence of employees who are not qualified under the Act." Pet. 15. Petitioners claim that the decision of the court of appeals therefore creates a circuit split with the Eighth Circuit's decision in *Knowles* v. *United States*, 91 F.3d 1147 (1996). It is true that the court of appeals in this case acknowledged it was departing from *Knowles*, citing Judge Beam's dissent in that case and praising its reasoning. Pet. App. 1.11 to 1.12. This case, however, does not present a good vehicle for resolving the arguable split among the circuits.

Knowles involved claims against several medical services specialists who the South Dakota Supreme Court had held on certification were not covered by that state's cap on recovery for medical malpractice. See 91 F.3d at 1149 (citing *Knowles* v. *United States*, 544 N.W.2d 183, 192 (S.D. 1996)). The Eighth Circuit reasoned not that a private hospital in South Dakota would not have received the same protection, but rather that the United States should not receive that protection because, under the FTCA, it had assumed the liability of the medical services specialists themselves. *Id.* at 1150 ("[I]f medical services specialists, individually, are not protected by the statute, neither is the United States shielded from the consequences of their negligence.").

The court of appeals in this case rejected that reasoning, holding that the position of the United States under the FTCA is like that of a private employer sued

in *respondeat superior*. Pet. App. 1.9 ("If 'private person,' § 1346(b), and 'private individual, § 2674, includes employers, then the recovery cap applies here because the private employer analogous to a government hospital is a private hospital."). It relied not only on the text of the FTCA, but also on the legislative history of that statute; the reasoning of other courts, including this Court's statement in *Gutierrez de Martinez* v. *Lamagno*, 515 U.S. 417 (1995) that "[g]enerally, [FTCA] cases unfold much as cases do against other employers who concede *respondeat superior* liability," *id.* at 420; and the policy concern that Congress would not have wanted to expose the United States Treasury to state law suits from which the States have seen fit to protect private employers.

Although the divergence of the Eighth Circuit's reasoning in *Knowles* from that of the court of appeals in this case may ultimately lead to a conflict that would justify this Court's review, for three reasons this case is not a suitable vehicle for resolving any such conflict.

First, it is not clear that this case on its facts presents the question addressed in *Knowles*. The United States took the position in the district court and before the court of appeals that the employees here ("hospital administrators and a nurse," Pet. App. 1.4), were in fact covered by the New Mexico cap, because that cap refers by its terms to "the aggregate dollar amount recoverable by all persons for or arising from any injury or death to a patient as a result of malpractice," N.M. Stat. Ann. § 41-5-6(A). Although the court of appeals declined to rest its holding on that ground (Pet. App. 1.8) it did not reject it, and the United States adheres to its position. If that is correct, then even applying the analysis of *Knowles*, there is no conflict between the Eighth and the Tenth Circuits on the facts of this case.

Second, the holding of the court of appeals that the claims of the estate are time-barred would suffice to reduce the total damage award in this case below the $600,000 statutory cap, rendering the cap irrelevant. Although petitioners seek review on the time-bar question, it does not (as explained below) even arguably warrant review by this Court. This Court should therefore leave undisturbed the correct judgment of the court of appeals.

Third, it appears from the petition that petitioners do not really embrace the Eighth Circuit's view that the United States steps into the shoes of the employee, and is not liable like a private-sector employer sued under a *respondeat superior* theory. Instead, petitioners appear to concede that the United States is liable as an employer, but dispute whether a private employer would benefit from the state-law damages cap under analogous circumstances. That question neither implicates a circuit split nor merits this Court's plenary review.

Petitioners' argument starts with the premise that the court of appeals "did correctly admit that the *respondeat superior* liability of the United States under the FTCA is limited to that of a private employer under like circumstances." Pet. 15. Further, they contend that

> [n]o holding of this Court, and nothing in the language of the Federal Tort Claims Act, permits the United States, sued in *respondeat superior* as it must be, to assert an affirmative defense which would not be available to the individual employee. No New Mexico hospital sued for the negligence of its nurses or administrators has ever been granted the protection of the NMMMA.

Pet. 17. That is, petitioners' complaint is not that the Tenth Circuit, in contrast to the Eighth, assessed the liability of the United States by analogy to a private employer sued in *respondeat superior*, rather than by direct analogy to the employee. Instead, the complaint is that the Tenth Circuit misunderstood the New Mexico rule for private employers sued in a *respondeat superior* capacity. That claimed error in a federal court's interpretation of New Mexico law does not warrant review by this Court.[3]

2. Petitioners also argue that the court of appeals should not have remanded this case to the district court to determine what part of Mr. Haceesa's chance of survival was lost because of the actions of government personnel. Pet. 18–21. Two hospitals, one government and one private, failed to make the correct diagnosis. The court of appeals merely concluded that, under New Mexico law, the district court should allocate fault between the two hospitals and hold the United States liable only for its fault. Pet. App. 1.16 to 1.17.

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[3] Petitioners also seek to cast the court of appeals' holding as an allocation of the burden of proof on a factual issue, and criticize it for that reason. Pet. 15 ("The record is devoid of any attempt by the United States to meet its burden on this factual issue."); Pet. 17 ("[T]he United States should have the burden of establishing its entitlement to the protections of [the statutory cap]."). The court of appeals correctly concluded that the "like circumstances" inquiry under 28 U.S.C. 2674 was a legal one and not a factual one, and so there is no burden of proof to allocate. Pet. App. 1.9 (identifying the question as one of "statutory interpretation"). The court of appeals' brief remark that "the record * * * is totally inadequate *even* to establish Plaintiff's factual premise" (*id.* at 1.7 (emphasis added)), was a response in the alternative, preceded by the observation that the number of "private medical providers [who] voluntarily cho[o]se not to qualify as a qualified health care provider" is irrelevant. *Ibid.*

Petitioners object that this holding resulted from a theory different from that argued by the government. They call this result a "[n]ovel and [c]omplex '[s]urprise.'" Pet. 18. For this reason, petitioners say that the appellate court's holding "was, at least, fundamentally unfair to Petitioners, and, at most, a Due Process violation." Pet. 21.

Petitioners' argument lacks support in either the record or the law. As the court of appeals noted: "During trial, the Government attempted to prove that physicians at [San Juan Hospital—the non-government facility] were negligent in failing to accurately diagnose Haceesa's illness. The Government further argued that damages should be apportioned between it and San Juan [Hospital]." Pet. App. 1.12 to 1.13. The United States argued that, as a matter of New Mexico law, the district court should have classified the two treating hospitals as concurrent rather than successive tortfeasors, relying on Section 41-3A-1(A) rather than Section 41-3A-1(D). The court of appeals rejected the government's legal analysis, but agreed with the government's conclusion that damages should be apportioned between it and San Juan Hospital. The appellate court held that the apportionment of damages should be determined pursuant to Section 41-3A-1(D), which provides that "each tortfeasor 'is severally liable only for the distinct harm which that person proximately caused.'" Pet. App. 1.13. The court of appeals concluded that this was not logically a case in which the government should be held liable for all injury as "an original tortfeasor" under New Mexico law, since the initial injury was not caused by the government, but by hantavirus infection. *Id.* at 1.17.

Petitioners argue that once the court of appeals rejected the government's argument that it was a con-

current tortfeasor, the court was constrained to affirm. Pet. 19–20. Petitioners argue this view based on their mistaken conviction that the court of appeals was limited to considering only the legal theories advanced by the parties. As this Court has explained:

> When an issue or claim is properly before the court, the court is not limited to the particular legal theories advanced by the parties, but rather retains the independent power to identify and apply the proper construction of governing law.

Kamen v. *Kemper Fin. Servs., Inc.*, 500 U.S. 90, 99 (1991); see *United States Nat'l Bank* v. *Independent Ins. Agents of America, Inc.*, 508 U.S. 439, 446 (1993). In this case, the United States properly presented the court of appeals with its claim that it should pay for only that part of the damages not caused by San Juan Hospital; the court identified and construed the governing law, and resolved the claim.

The approach of the court of appeals was proper even as a question of good judicial practice. Petitioners' argument that the court not only erred, but also violated due process of law, wholly lacks merit. Further, although petitioners sought rehearing by the court of appeals, the only hint towards their present claim of a constitutional violation was a brief footnote "question-[ing] whether this complex issue of first impression was properly raised *sua sponte* by the Court if [sic] for the first time on appeal." Pet. for Reh'g 11 n.3. Neither petitioners' constitutional claim nor their underlying claim of error in state law warrants this Court's review.

3. Petitioners argue finally (Pet. 21-26) that the court of appeals improperly rejected the claims of Hardy Haceesa's estate as barred by the statute

of limitations. The relevant statutory provision states that

> [a] tort claim against the United States shall be forever barred unless it is presented in writing to the appropriate Federal agency within two years after such claim accrues or unless action is begun within six months after the date of mailing, by certified or registered mail, of notice of final denial of the claim by the agency to which it was presented.

28 U.S.C. 2401(b). This Court has said that in construing this language, which is part of the waiver of sovereign immunity effected by the FTCA, the courts should neither "take it upon [themselves] to extend the waiver beyond that which Congress intended" nor "assume the authority to narrow the waiver that Congress intended." *United States* v. *Kubrick*, 444 U.S. 111, 118 (1979).

a. The court of appeals reasoned that because the estate's claim was finally denied on April 28, 1999, the estate was required to begin its action within six months of that date to avoid the bar, which it did not. Pet. App. 1.19. Petitioners object that the estate's claims should be permitted to relate back to their original complaint, filed on January 15. As the court of appeals concluded in response to this objection, even were the estate deemed to have filed its claims on January 15, those claims would still have been barred for failure to exhaust administrative remedies, as the IHS had not yet either actually or constructively denied them. See 28 U.S.C. 2675(a) (requiring that a claim either be actually denied by an agency or constructively denied by a delay of at least six months before "[a]n action shall * * * be instituted" under the FTCA);

McNeil v. *United States*, 508 U.S. 106, 110-113 (1993) (reading this language to require the dismissal of an action brought before exhaustion of administrative remedies, even though exhaustion occurs before "substantial progress has been made" in the litigation).

Petitioners reply (Pet. 23-26) that their original July 1998 administrative claims, fairly read, raise the estate's claims; and, therefore, that the six months required for constructive denial by 28 U.S.C. 2675(a) had passed before the filing of the original complaint. The court of appeals gave petitioners a full hearing on this point, discussed their claims at some length, Pet. App. 1.19 to 1.22, and held that the original administrative claims did not fairly raise the estate's claims. That fact-specific determination lacks any general importance that would warrant review by this Court, and was in any event correct. The July 1998 claims omit any demand on behalf of the estate or for damages to Haceesa himself (*id.* at 1.65 to 1.66, 1.69); the October 1998 claims include both (*id.* at 1.73). Haceesa's counsel knew, as did the agency, that this difference had a legal effect, which is presumably why counsel filed a separate claim for the estate. Cf. *McNeil*, 508 U.S. at 113 (reasoning that "the risk that a lawyer will be unable to understand the exhaustion requirement is virtually nonexistent").[4]

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[4] Petitioners say that the Sixth and Seventh Circuits would have held that the July 1998 administrative claims fairly raised the claims of the estates, relying on *Knapp* v. *United States*, 844 F.2d 376 (6th Cir. 1988), and *Murrey* v. *United States*, 73 F.3d 1448 (7th Cir. 1996). *Knapp* addressed the distinct question whether the fact that a decedent's spouse had not been formally certified as personal representative of her husband's estate when she filed her administrative claim—though she filed a claim that on its face clearly asserted the estate's rights so as to satisfy 28 U.S.C.

b. Petitioners finally argue that because "the United States expressly agreed to amendment of Plaintiffs' Complaint prior to the expiration of the six (6) month period in question," the decision conflicts with *Kelley* v. *United States*, 568 F.2d 259 (2d Cir. 1978). Pet. 23-24. There is no conflict. In *Kelley*, the Second Circuit held that a plaintiff who did not know that the defendant was a federal employee and filed suit in state court could avoid dismissal after removal to federal court despite failing to file an administrative claim within the statutory deadlines.[5] The current case does not involve this question of interaction between the FTCA's exaustion provisions and its removal provisions; counsel for petitioners knew that they were dealing with the federal government and knew that they were subject to the FTCA's procedures.

In this case, as the court of appeals explained, the government informed petitioners that it would not oppose an amendment to include the estate's claims, but

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2675(a)—deprived the district court of jurisdiction. 844 F.2d at 377, 380. *Murrey* involved a different theory of recovery for the same damages to the same party, 73 F.3d at 1452, and can be distinguished on that ground alone. In any event, *Murrey* focused on what would appear to a "legally sophisticated reader," *id.* at 1453, and in this case, a legally sophisticated reader would have inferred from the July 1998 administrative claims not that the demand of the estate was implicitly presented there, but instead that any such demands would be raised in a separate filing, as indeed they were. Neither case establishes a split among the circuits.

[5] The 1988 amendments to the FTCA, which protect the plaintiff who has no knowledge of the federal presence in a case, address the Second Circuit's concerns in *Kelley*. See 28 U.S.C. 2679(d)(5) (as amended by Federal Employees Liability Reform and Tort Compensation Act of 1988, Pub. L. No. 100-694, 102 Stat. 4563).

did not believe that this could be done by interlineation. Pet. App. 1.22.[6] The United States took that position before the expiration of the six-month period mandated by 28 U.S.C. 2401(b). As the court of appeals noted, "[g]overnment counsel did nothing wrong." Pet. App. 1.22. Accordingly, the petitioners' statement that "[t]he United States must not be encouraged to continue to act in the manner demonstrated here" (Pet. 26) lacks any foundation in the record of this case and provides no basis for this Court's review.

The result in this case is undeniably severe in that it reduces petitioners' claims against the United States to considerably less than New Mexico's statutory cap.[7] That result, however, was contemplated by Congress's enactment of Sections 2401 and 2675; and by this Court's conclusion in *McNeil* that "[t]he interest in orderly administration of this body of litigation is best served by adherence to the straightforward statutory command" requiring exhaustion, 508 U.S. at 112. The faithful application of those mandates by the court of appeals does not warrant review by this Court.

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[6] Nothing in the record suggests that counsel for the United States took that position in bad faith or for the purpose of delay. The district court agreed with the position of the United States on this admittedly minor procedural point, requiring petitioners to "submit a fully amended complaint." Pet. App. 1.32.

[7] Petitioners (including the estate) retain claims against San Juan Hospital and the physicians employed there, which count towards the total recovery permitted by the cap. Petitioners have filed at least three such actions and settled one. *Haceesa* v. *San Juan Reg'l Med. Ctr.*, No. 99cv00193 (D.N.M. filed Feb. 25, 1999), dismissed by stipulation (Oct. 13, 2000); *First Fin. Trust Co. ex rel. Haceesa* v. *San Juan Reg'l Med. Ctr.*, No. D-202-CV-9811986 (N.M. 2d Dist. filed Dec. 15, 1998, stayed Sept. 19, 2001); *First Fin. Trust Co. ex rel. Haceesa* v. *Patel*, CV-200102842 (N.M. 2d Dist. filed Apr. 23, 2001, stayed June 4, 2002).

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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